

THE NEW INTERNATIONAL CHAMBERS OF THE PARIS COURTS – INNOVATIVE WAY FOR RESOLUTION OF COMMERCIAL DISPUTES

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Abstract: The process of the withdrawal of the United Kingdom from the European Union has been discussed predominantly from a political and economic point of view. However, the consequences are more far reaching. With UK on the doorstep of leaving the EU, the decisions issued by its courts would no longer benefit from the recognition system provided in the Brussels Regulation (Council Regulation (EC) No. 44/2001). As a result of this, it is expected that London would no longer be seen as a primary destination for international litigants.

In the awaiting of the aftermath from the Brexit, other cities and member state countries of the EU have started the race to position themselves as the next “legal hub”. While other member states have been vocal about offering alternative courts, so far France has been at the forefront of this initiative. On 7 February 2018 two Protocols were signed by the French Minister of Justice, the President of the Paris Bar, and the presidents of the Paris Court of Appeal and the Paris Commercial Court. With the first protocol amendments were made to the already existing International Chamber within the Paris Commercial Court, whereas with the second Protocol a new International Chamber has been created within the Paris Court of Appeal. The aim of the creation of these international divisions within the Paris Court is to create an attractive jurisdictional system which would meet the expectations of the economic actors. Paris has already been one of the most important world centers for dispute resolution as a result of the work of the International Chamber of Commerce and its work in the field of Alternative Dispute Resolution (ADR). However, with this initiative Paris has an opportunity to further strengthen its attractiveness.

The adoption of the two Protocols is a groundbreaking move which sets forth innovative rules of procedure, incorporating unique approaches in the field of international commercial litigation. The rules of procedure contain an increased level of flexibility offering the parties a chance for litigations with great similarity to arbitration. Most notably, the new Protocols provide for the usage of English as language in the course of the proceedings, adapted procedure which should better suit the need of the parties, focus on oral testimonies instead of written witness and expert submissions, possibility for cross – examination, broader scope of tools for securing evidence, such as requests for document production, as well as the possibility of non- French lawyers to appear in front of the Courts. The aim of this article is to provide an insight in the new structure of the International Chambers by reviewing the novelties in the two new Protocols. The article reflects on similar initiatives which have been undertaken in other EU members and countries worldwide, and whether this can be the starting point for more drastic and revolutionary reforms in the traditional litigation system.

Keywords: Specialized commercial courts, Commercial law, International Commercial Chambers, Dispute resolution.

1. INTRODUCTION

The announcement of the United Kingdom (hereafter UK) for its withdrawal from the European Union (hereafter EU) after the referendum held in June 2016 has made a tectonic impact on the devolvement of the EU. While it becomes more evident that the decision is final as the negotiations for the terms of the withdrawal of the UK from the EU are already in full speed, other EU member states are preparing for what comes after Brexit. Although the main discussions are predominantly focused on the geopolitical and the economic effects which the process will have on the EU, the effects on the legal system should not be undermined.

For many years, London has been the one of the most significant places for commercial dispute resolution. Without undermining the significance of London in the field of international commercial arbitration, undoubtedly its largest success is in the field of commercial litigation. In 2016 in the UK the market of commercial litigation services amounted to a total of 16 billion euros.⁶⁸ There are number of reasons why London has been considered as a first choice of international litigants: historical importance in maritime and commodity trade, presence of important trade institutions such as the Grain and Feed Trade Association (GAFTA) and the International Steel Trade

⁶⁸ Knoll-Tudor, I. (2018). Specialised Chambers for International Commercial Disputes: Paris in the Spotlight - Kluwer Arbitration Blog. Retrieved from <http://arbitrationblog.kluwerarbitration.com/2018/02/14/specialised-chambers-international-commercial-disputes-paris-spotlight/>.

Association (ISTA) among others. However, probably the most significant factors why London has enjoyed such status for cross-border disputes compared with other major cities within the EU is the use of English in the proceedings as default language, and the fact that the judicial awards enjoy the benefits for mutual recognition within the EU. Nowadays most international commercial contracts are drafted in English, and the English language dominates in the business world. Consequently it is more logical and cost efficient for the parties to submit their dispute to an English speaking forum, than to have to submit it in state court where everything would have to be translated in the language of the court. According to statistics the Commercial Court of London has roughly 1.000 procedures per year, out of which in 80% at least one party is foreign, and in at least 50% of the cases both parties are foreign.⁶⁹ However with the prospect of Brexit, the UK decisions will no longer be able to benefit from the recognition system provided in the Brussels Regulation (Council Regulation (EC) No. 44/2001). In this day and age, the system of mutual recognition of awards is of extreme importance since most of the companies are international and conduct their business in several countries, but even more important – they have assets in all countries in which they operate. The fact that litigants would no longer enjoy the simplified procedure within the EU and would be obliged to go through the process of exequatur, is a factor which might deter them to submit their future dispute to a UK based court. This would make the process of enforcement of awards not only lengthier but also more expensive, which leaves the possibility that international litigants would seek other options in order to be able to freely enforce the decisions within the EU.

This has prompted a race among member- states to optimize their judicial systems to be able to handle international commercial cases. While such initiatives have been undertaken in several cities such as Amsterdam, Frankfurt and Brussels, so far Paris has been at the forefront of the imitative taking concrete steps. On 7 March 2017 the French minister of Justice requested from a special committee - Haut comité juridique de la place financière de Paris (hereafter HCJP) to propose suggestions for establishment of a special court which would attract commercial parties to submit their disputes and would promote Paris as favorable destination for international litigants. On 3 May 2017 the HCJP issued a report which contained 41 suggestions for reforms within the existing courts.⁷⁰

Based on the suggestions from the HCJP, on 7 February 2018 two new Protocols were signed by the French Minister of Justice, the President of the Paris Bar, and the presidents of the Paris Court of Appeal and the Paris Commercial Court. With the Protocol relating to the procedure before the International Chamber of the Paris Commercial Court⁷¹ (hereafter Protocol 1) amendments were made to the already existing International Chamber within the Paris Commercial Court, whereas with the Protocol relating to the procedure before the International Chamber of the Paris Court of Appeal⁷² (hereafter Protocol 2) a new International Chamber has been created within the Paris Court of Appeal. The date of entry into force for both Protocols is 1 March 2018.

2. WHAT ARE THE CHARACTERISTICS OF THE NEW INTERNATIONAL CHAMBERS?

Protocol 1 alters the already existing International Chamber within the Paris Commercial Court (hereafter ICAP). Initially, this Chamber was created in 1995, however the applicable procedural rules did not attract a satisfactory number of litigants. In 2015, this chamber merged with the Chamber of European Union Law which was established in 1997.⁷³ With the amendments, the International Chamber is composed of 10 judges all of which

⁶⁹ Weller, M. (2018). The Justice Initiative Frankfurt am Main 2017. Retrieved from <http://conflictoflaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/>.

⁷⁰ The complete text of the Report is available in French at: http://www.justice.gouv.fr/publication/Rapport_chambres_internationales.pdf.

⁷¹ Protocol relating to the procedure before the International Chamber of the Paris Commercial Court, Original - Protocole relatif à la procédure devant la chambre internationale du tribunal du commerce de Paris, available at: http://www.avocatparis.org/system/files/editos/protocoles_signes_creation_jurisdiction_commerciale_internationale_2.pdf, English (unofficial) translation available at : https://www.shearman.com/-/media/Files/Perspectives/2018/04/Protocol_relating_to_the_procedure_before_the_International_Chamber_of_the_Paris_Commercial_Court.pdf?la=en&hash=BEE7E9D9833EC33B9DADCFA576972DE8791EA49E.

⁷² Protocol relating to the procedure before the International Chamber of the Paris Court of Appeal, Original - Protocole relatif à la procédure devant la Chambre Internationale de la cour d'appel de Paris, available at: http://www.avocatparis.org/system/files/editos/protocoles_signes_creation_jurisdiction_commerciale_internationale_1.pdf, English (unofficial) translation available at : https://www.shearman.com/-/media/Files/Perspectives/2018/04/Protocol_relating_to_the_procedure_before_the_International_Chamber_of_the_Paris_Court_of_Appeal.pdf?la=en&hash=8539B15BCD02C6140DF2FDE5212C1B364FBCC1F4.

⁷³ Protocol 1, Preamble.

possess working knowledge in English. The Chamber is specialized in the resolution of economic and commercial disputes with international character, and beside French law, the judges have the power to apply any other rules of foreign law to the merits of the case.⁷⁴ In particular the ICAP has jurisdiction over disputes related to: commercial contracts and commercial relationships, transport, unfair competition, actions for damages arising from anticompetitive practices as well as disputes related to financial instruments and financial contracts.⁷⁵

Protocol 2 establishes the International Chamber of the Paris Court of Appeal (hereafter CICAP) which is a creation of a new chamber within the Paris Court of Appeal. Unlike Protocol 1, Protocol 2 does not contain a number of judges which would operate within the CICAP, however according to a report the Chamber would be composed of three judges which if necessary, would undergo additional training program both for technical and linguistic aspects.⁷⁶ In regard to the subject matter, the CICAP serves as an appellate body against decisions rendered by the ICAP, and has jurisdiction in international disputes of commercial and economic nature, as well as actions against awards rendered in international arbitration.⁷⁷

Aside from the number of judges and the wider scope of disputes which fall within the jurisdiction of the CICAP, the majority of provisions in both Protocols overlap. The particularities of the Protocols are subject to review in continuation of the text.

Use of English in the proceedings - Probably the greatest novelty in the Protocols is allowing the usage of English, and to a limited extent the usage of other languages. At the outset it is important to be noted that in France there is an obligation for the use of French in the domestic courtrooms stemming from the ordinances of Villers - Cotterêts from 1539.⁷⁸ As a result of this, all procedural documents in judicial proceedings, such as written submissions and procedural orders have to be drafted in French. However, the Protocols allow for use of English in a wide variety of situations. If the parties wish so, all exhibits can be submitted in English without the need for translation.⁷⁹ In particular the parties, their witnesses, experts, as well as the counsels of the parties when are foreign, are allowed to express themselves in English before the court.⁸⁰ If they do not speak English or wish to express themselves in other foreign language, such as their mother language, a simultaneous translation would be carried out by an interpreter which would be chosen by the parties.⁸¹ Taking into consideration the fact that the procedures before the International Chambers are oral⁸², which itself is a novelty and variation from the traditional “written proceedings” used in France, it means that the major part of the proceedings can be conducted in English. Beside the fact that this gives the parties broad discretion in the use of English, it also drastically saves costs when it comes to submitting official and sworn translations of documents as evidence. Finally, although judgments by the Chambers have to be drafted in French, they will be accompanied by a sworn translation in English.⁸³

Adapted procedure – Both Protocols provide for an adapted procedure which is more flexible in comparison with traditional judicial case management. The judges have the power to define a procedural calendar in coordination with the parties. The calendar should include the dates for submission of documents, hearing of witness and expert testimonies, hearings of counsels and closing statements, as well date on which the decision should be rendered.⁸⁴ These calendars are similar to procedural timetables which are common in international commercial arbitration. The aim of this provision is to provide a strict calendar to which the parties must abide by, and ultimately have a final decision in much shorter period. An important novelty in the proceedings which would be conducted in front of the CICAP is the availability of a procedural judge (conseiller de la mise en état). The

⁷⁴ Ibid.

⁷⁵ Ibid, Article 1.

⁷⁶ Gaillard, E., & Banifatemi, Y. (2018). The International Chambers of the Paris Courts and Their Innovative Rules of Procedure. Retrieved from <https://www.shearman.com/perspectives/2018/04/paris-courts-and-their-innovative-rules-of-procedure>.

⁷⁷ Protocol 1, Article 1.

⁷⁸ Métais, P., & Valette, E. (2018). Paris as an international jurisdiction: creation of chambers specialized in cross-border disputes White & Case LLP International Law Firm, Global Law Practice. Retrieved from <https://www.whitecase.com/publications/alert/paris-international-jurisdiction-creation-chambers-specialized-cross-border>.

⁷⁹ Protocol 1, Article 2 & Protocol 2, Article 2.

⁸⁰ Ibid.

⁸¹ Protocol 1, Article 6 & Protocol 2, Article 3.

⁸² Protocol 1, Article 2.1.

⁸³ Protocol 1, Article 7 & Protocol 2, Article 7.

⁸⁴ Protocol 1, Article 3.

procedural judge is in charge of coordinating pre-trial matters such as: holding a preliminary hearing on the judicial administration of the taking of evidence, hearing in preparation for the trial, as well as determining the procedural calendar.⁸⁵ Compared to traditional judicial system where usually number of years are necessary for decision to be rendered, not into account the appeal process, in the specialized chambers the procedures would be streamlined, and the time would be rigorously managed. The final decision is expected to be rendered within a period of 6 months of the first case management hearing.⁸⁶

Introduction of common law concepts - Additionally, the Protocols encompass a number of features which are not common for traditional civil law countries but are typical for common law systems, such as the UK. One of them is the emphasis on oral submissions in the procedure instead of the written documents-based approach. Usually in civil law systems the hearings are very short, time extensions are easily granted, and the counsels have limited time for oral arguments. The communication between the parties and the judge is typically with exchange of written submissions, and the evidence such as witness statements and expert statements are in written form. Contrary, the Protocols favor testimonial approach for evidence where witnesses and experts can be called to testify and answer questions. This means that the hearings would be longer, more detailed and the parties would not have time constraints to plead their case. In line with this novelty, the parties and their counsels have power to pose questions to the other party, to the experts and to the witnesses. Unlike traditional settings in civil law traditions, where the judge is the only one who has to power to interrogate the parties and the witnesses, the Protocols provide that witnesses can be “invited by the judge to respond to the questions that the parties wish to ask.”⁸⁷ Traditionally, cross-examination as a method for witness interrogation exists in civil law systems only in criminal law procedures. The fixed procedural calendar, which should provide for shorter deadlines for period between hearings and submissions along with the more detailed oral hearings serve as methods for achieving procedural economy – making the whole process more compact and streamlined.

Another novelty within the Protocols is the possibility for documents production which undoubtedly has its roots from the common law. The Protocols explicitly grant the power to the parties or to the judges to request documents which are held or in possession of the opposing party, or a third party.⁸⁸ There is an argument that this provision might be interpreted more extensively by the judges, as to include a broad style of documents production similar to discovery,⁸⁹ however this remains to be seen in the future cases where this issue will arise.

Qualified judges – As already noted above, there will be permanent judges sitting in the International Chambers. The ICAP would be composed of 10 judges whereas the CICAP will have 3 judges. The judges should have experience in dealing with commercial, economic and financial disputes, and should possess a working knowledge in English. Additionally, the judges should be able apply to the merits of the case not only French law, but also any other foreign law or rules of law which might be applicable to the case. In order to be able to produce satisfying results the judges would have ongoing trainings and qualifications. However, when a certain complex case requires specific knowledge in other areas such as competition law or intellectual property rights, which would fall out of the subject matter of the International Chambers as defined in Article 1, the judges would be able to ask for assistance from other judges from those specialized chambers.⁹⁰

Participation of foreign lawyers - The possibility to have foreign lawyers appear in front of the judges in the International Chambers is another novelty provided in the Protocols. Traditionally foreign lawyers are able to represent clients in front of the state courts, only if they are also admitted to a bar association within the jurisdiction of the court. Although there are lawyers which are admitted to several bars and consequently are able to practice law in several jurisdictions – this is really an exception, not the general rule. Contrary to this, in arbitration the parties are free to choose to be represented by whoever they deem fit, regardless of whether the counsel is submitted to one or several bar associations. The Protocols take an innovative approach which allow for participation of foreign

⁸⁵ Protocol 2, Article 4.

⁸⁶ Fairgrieve, D., & Le Tutour, S. (2018). Doors open for First Hearing of International Chamber at Paris Court of Appeal. Retrieved from <http://conflictoflaws.net/2018/doors-open-for-first-hearing-of-international-chamber-at-paris-court-of-appeal/>.

⁸⁷ Protocol 1, Article 4.4.4 & Protocol 2, Article 5.4.4.

⁸⁸ Protocol 1, Article 4.1 & Protocol 2, Article 5.1.

⁸⁹ Fairgrieve, D., & Le Tutour, S. (2018). Doors open for First Hearing of International Chamber at Paris Court of Appeal. Retrieved from <http://conflictoflaws.net/2018/doors-open-for-first-hearing-of-international-chamber-at-paris-court-of-appeal/>.

⁹⁰ Protocol 1, Preamble.

lawyers but not without limitation. Namely, foreign lawyers would be able to appear before the International Chambers, as long as they are accompanied by a lawyer who is admitted to the Paris Bar.⁹¹

The accepted approach within the Protocols is somewhere in between in the range of strict rules of representation in litigation and the completely liberal regime in arbitration.

3. CONCLUSION

As it is becoming more evident that the UK is leaving the EU, the race for the creation of modernized commercial courts among other EU members which would challenge the supremacy of the English courts is in full speed. The aim of the reform undertaken within the French judicial system is to promote Paris as the next “legal hub” within the EU, and to attract parties which might be deterred from choosing London in the future. The acceptance of concepts from the common law tradition is a clear signal that the primary goal is to accommodate the needs of international litigants. Paris has already been established as a major center for international commercial disputes. The presence of the International Commercial Chamber (ICC), which is headquartered in Paris has had a major impact in establishing Paris as the primary choice for international commercial arbitration. In addition, the only hearing facility of the International Center for Settlement of Investment Disputes (ICSID), outside from Washington is in Paris, which makes Paris a prominent place for international investment arbitration as well. The French government has been making efforts to increase Paris’s competition with other major centers such as London, Geneva and Frankfurt even before the Protocols, most notably with the enactment of a pro-arbitration law in 2011 which made the country one of the most arbitration – friendly jurisdictions. The same result is expected with the International Chambers.

The undertaken reform can have impact on two levels: national and international. On international scale other countries have initiated similar initiatives trying to reform their judicial procedures as to accommodate international commercial parties. Frankfurt has already taken similar steps⁹² in Amsterdam and the Netherlands a draft legislation has been proposed,⁹³ and in Zurich evaluations about establishing International Chambers are being made.⁹⁴ If the operation of the International Chambers proves successful, it is expected that similar chambers and specialized courts would be open in other countries and cities within the EU. The establishment of the ICAP and the reformation within the ICAP might prove the initial action which might trigger a chain of events that might lead to revolution in the judicial procedures. Looking at national level, the countries that have already undertaken initiatives might decide to establish similar chambers and specialized courts in other cities if the chambers within the major cities prove effective. Cities such as Rotterdam, Marseilles and Hamburg are just a few cities which have high concentration on disputes related to maritime law and might benefit from similar chambers.

It is important to be noted that the initiatives for establishment of specialized chambers and courts are groundbreaking within the EU, but similar initiatives have already been undertaken in other states in the world. Dubai, Qatar, and Singapore have already created new courts with the aim of attracting international commercial disputes. The Dubai International Financial Center (DIFC) is the oldest specialized court, established in 2004, which operates successfully having decided 217 disputes in 2016 alone, the Qatar International Court and Dispute Resolution Center (QICDRC), which was established in 2009 in Doha, rendered 38 decisions between 2009 and 2017, and the Singapore International Commercial Court (SICC), which is the most recently established in 2015, so far has heard 9 cases.⁹⁵ The statistics point out that the operation of the specialized courts becomes more attractive over longer period of time.

⁹¹ Fairgrieve, D., & Le Tutour, S. (2018). Doors open for First Hearing of International Chamber at Paris Court of Appeal. Retrieved from <http://conflictoflaws.net/2018/doors-open-for-first-hearing-of-international-chamber-at-paris-court-of-appeal/>.

⁹² More on this Weller, M. (2018). The Justice Initiative Frankfurt am Main 2017. Retrieved from <http://conflictoflaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/>.

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⁹⁴ Matic, N. (2018). In The Pipeline: Zurich International Commercial Court - International Law - Switzerland. Retrieved from <http://www.mondaq.com/x/745118/international+trade+investment/In+The+Pipeline+Zurich+International+Commercial+Court>.

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Weighing in on the prospects of success of the Specialized Chambers we believe that there are two factors which go in their favor. Primary, it is the fact that such institutions already exist and have managed to establish themselves and operate with success in countries like Singapore where arbitration is very prominent, if not dominant compared to litigation, but also in countries that in the past have not been considered as attractive destination for dispute resolution such as Dubai and Qatar. Additionally, due to the existence of these institutions, international parties are already familiar with the concept of being able to litigate under flexible rules similar to arbitration, so the process of adaptation and familiarization should be short. Secondly, and most importantly the initiatives are triggered by the prospects of Brexit, which means that the countries are making institutional preparation to accommodate international litigants which favored London but would no longer be able to take advantage of the benefits of the EU regulations. In any case, the success of the international chambers and specialized courts would depend on the approach taken by the judges and the emerging case law which would reflect on the operation of the institutions. For this reason, the first cases which will be accepted by the chambers would have to throw the hardest punch, projecting trust and reliability.

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